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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. ——

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

THE BORDEN COMPANY

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 19–30) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98–128)[1] is not yet officially reported. The initial decision and order of the hearing examiner are printed at R. 13–97.

[1] "R." refers to the printed record in the court of appeals.

## JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (App. B, *infra*, p. 31). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain kinds of discrimination in price involving "commodities of like grade and quality". The question presented is whether products identical in all other respects become of different "grade and quality" when sold under a private brand name instead of the manufacturer's advertised name and label.

## STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where

> the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

## STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging the respondent with price discrimination in selling evaporated milk in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private brand labels at lower prices than it sold its "Borden" brand milk; and that the effect of such price discriminations may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1–5).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98–128).[2] Following its prior decisions that "goods which are the same in all respects except labels are * * * goods of like grade and quality" (R. 101–102), the Commission ruled that since the Borden brand and the private brands of evaporated milk were

[2] Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

"physically * * * alike" (R. 100–101),[3] they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials constituted "discrimination" (R. 105–106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106–120), and that they were not cost justified (R. 126).[4]

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved

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[3] The Commission found (R. 79–80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

[4] The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21–22, 31). He further held, however, that the discriminations did not result in competitive injury at either line of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76–96).

in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107–108); that because of the competitive situation between respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially-lower-priced private brand if it had been made available to them; and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116–120; see R. 741–743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (App. A, *infra*, pp. 22, 23). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (*id.*, pp. 22, 24). It ruled (*id.*, p. 26) that "[i]n determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name" (*id.*, p. 28). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (*id.*, p. 30). By the same token, only that single statutory question is presented here.

## REASONS FOR GRANTING THE WRIT

This case presents an important question of statutory interpretation involving the authority of the Federal Trade Commission to deal with price discriminations resulting from the sale of the same product under different labels to different customers at different prices. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits certain price discrimination between different purchasers of "commodities of like grade and quality." The court of appeals held that physically-identical commodities cease to be of "like grade and quality" if the seller can obtain a higher price when it markets them under its own brand than when it sells them under private brand names. This interpretation of the statute distorts the meaning and intent of its language, is contradicted by its legislative history, and is contrary to the agency's settled administrative interpretation. It would seriously handicap the Commission in enforcing the statute against one of the major evils which Congress sought to reach. In the circumstances, review by this Court is required.

1. (a) As a matter of simple English usage, the "grade and quality" of a commodity refer to its physical and chemical properties, not to the price at which it is sold. While consumer preference may increase the importance of only slight differences in grade and quality, it cannot create such differences when the grade and quality are in fact identical. Two cans of

milk containing the identical product are of like grade and quality regardless of what labels they bear or how much consumers are willing to pay for them.

(b) That Congress used the words "like grade and quality" with their normal reference to the physical characteristics of goods, and not their selling price, is confirmed by the basic purpose and plan of the statute, and also its legislative history. "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained *discriminatory preferences* over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168, emphasis added). "[D]iscrimination in price" means "selling *the same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 721, emphasis added). The obvious purpose of the "like grade and quality" requirement was to make it clear that a seller still retained the right to charge different prices for different products.

Sellers traditionally have attempted to persuade customers to pay more for a different product because it is better, *i.e.*, because it has qualities or characteristics that make it superior and therefore worth more. As a corollary, products that do not have those alleged advantages frequently are sold for less. Permitting a seller to give a lower price on a different product—one that was not of "like grade and quality"—did not

pose any threat to competitive injury which concerned Congress. What Congress was worried about in 1936 was the injury to competition that resulted when large buyers, principally the chain stores, paid less for the same product than their small competitors. For such preferences could give the large buyer a decisive advantage in selling the product in competition with smaller stores that did not receive such favored treatment. But in dealing with that problem, Congress explicitly did not prohibit a seller from charging less for a different product; it barred only discriminations in price with respect to "commodities of like grade and quality."

(c) The legislative history shows that Congress was aware of the use by chain stores of private brands as a means of gaining an unfair competitive advantage, and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under the same brand or under different brands. Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were "of like grade and quality" (80 Cong. Rec. 8115, emphasis added):

> Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for

> particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package,* and this will remedy the situation to which the gentleman refers.
>
> Mr. TAYLOR of South Carolina. *Irrespective of the brand.*
>
> Mr. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra,* 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.,* 2d sess., at 469):

> To amend the bill by inserting "and brands", after the words "commodities of like grade and quality", as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same

brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report cited with approval the Commission's decision in *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears Roebuck & Co. under the latter's private brands the same tires that it sold at higher prices under its own brands. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4; and see the numerous references to the *Goodyear* case during the hearings (House Hearings, *supra,* pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to

the Robinson-Patman Act,[5] the earlier statute had a similar provision relating to "grade" and "quality," and in approving the case the Committee obviously meant to make it clear that commodities that were otherwise of "like grade and quality" did not cease to be so because the manufacturer sold them at a higher price under its own brand than under private brands.

(d) The holding below that physically-identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administrative interpretation. The Commission repeatedly has treated physically identical goods as of "like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973–975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 46 F.T.C. 998; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see, also, *The Goodyear Tire & Rubber Co., supra.* "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391;

[5] In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

see *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549).[6]

The court of appeals, although recognizing that these Commission decisions "all treated goods of differing brands as being of like grade and quality," distinguished them on the following ground (App. A, *infra*, p. 27):

> * * * In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it im-

[6] The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report, p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463–464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424–428 (1963). Contra, Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

> parted a premium market value to the Borden product which the private label product did not enjoy.

This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that nationally advertised brands of vodka and whiskey were of "like grade and quality" with the same liquors that were sold under private labels.[7]

But if, as we have shown, the statutory standard of "like grade and quality" refers to the organic properties of a product and not to the brands or labels under which it is sold, it is immaterial whether a particular brand name is of "commercial significance" in the sense that consumers are willing to pay more for it than for another brand. Goods that in fact are of "like grade and quality" even though sold under different brands do not cease to be alike because the particular brand has been so effectively advertised and promoted that it can command a higher price in the marketplace. In short, in determining whether commodities are of "like grade and quality," the inquiry is whether the two products are physically and organically the same, not whether they are sold at different prices.

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[7] The court stated (App. A, *infra*, p. 26) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * * In this case, the brand name had commercial significance."

(e) The court of appeals also concluded (App. A, *infra*, pp. 28–30) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides. The latter section permits a seller to rebut a *prima facie* case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is not "meeting" but rather is "beating" his competitor's price. See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F.T.C. 277.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand, and the offer of the latter at its usual lower price cannot be viewed as a competitive threat to the market of the premium brand. But to recognize that the existence of a consumer prefer-

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ence for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section 2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."

2. The decision of the court of appeals, if allowed to stand, will seriously handicap the Commission in enforcing the statute. For the effect of the holding below that identical goods cease to be of "like grade and quality" if part of them are sold under a particular brand name that has "commercial significance" (App. A, *infra,* p. 27) in the sense that customers will pay more for the brand, is to insulate from the statute's prohibitions a vast category of price discriminations in favor of the large chain stores that market their own private brands. As we have noted (*supra,* pp. 9–12), Congress was aware that price discriminations based on private brands were a means by which large purchasers could and did gain a significant advantage over their smaller competitors. The decision below, however, makes the statute inapplicable as a matter of law to most of those discriminations, and without regard to how serious a threat to competition they may pose.[8] A decision with such far-reaching consequences should be reviewed by this Court.

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[8] One trade publication has described the legal consequences of the court of appeals' decision as "revolutionary." 35 *Advertising Age*, December 21, 1964, pp. 1, 16.

3. As the case comes to this Court, it does not require consideration or determination of the broader issue of the circumstances under which Section 2(a) prohibits a seller from charging less for the same goods when sold under a private brand than under its own brand name.[9] We are requesting the Court to review only the court of appeals' ruling on the "like grade and quality" issue—a ruling which removes the entire subject matter from the Commission's jurisdiction and which properly may be reviewed without inquiry into those broader issues. The resolution of the latter turns upon the questions which the court of appeals did not reach, *i.e.*, whether the price discriminations had the requisite anticompetitive effect, and, if so, whether they were cost justified. If the Court grants the petition and reverses the ruling below on the threshold statutory question, it will be necessary to remand the case to the court of appeals for it to decide the remaining issues, as in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

[9] We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

CONCLUSION

The decision below is inconsistent with the words of the statute, the legislative history and the long-standing administrative construction of the Federal Trade Commission, and presents a novel question of statutory construction which is of general public importance. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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MAY 1965.

# APPENDIX A

[Federal Trade Commission Docket 7129]

## In the United States Court of Appeals for the Fifth Circuit

No. 20463

THE BORDEN COMPANY, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

*On Petition for Review of an Order of the Federal Trade Commission*

(December 4, 1964)

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This is a petition by the Borden Company to review and set aside a cease and desist order of the Federal Trade Commission[1] based upon its decision that Borden had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), the pertinent portion of which provides:

[1] The Commission, with two members not participating and one member dissenting, entered its order with the concurrence of two of its five members.

> "It shall be unlawful * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *"

The challenged order is based on the Commission's decision that Borden violated Section 2(a) by discriminating in price between purchasers of its private label evaporated milk, sold under brand labels owned by the customer, and purchasers of its Borden brand evaporated milk.

The Borden Company is engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products. Since about 1938 it has been selling both Borden brand and private label evaporated milk. (The use of the term "milk" in this opinion is intended to refer only to evaporated milk.) The Borden brand, like the Carnation and Pet brands, was sold on a delivered price basis which was uniform throughout the country. The private label milk was sold by Borden on an f.o.b. plant basis, with prices determined under a cost-plus formula. In 1956 and 1957 Petitioner expanded its private label operations to its two southern plants, located at Lewisburg, Tennessee, and Chester, South Carolina, which had not previously packed private label milk. As a result of these new operations some private label business

which had been served by other packers shifted to Borden. This litigation ensued.

Borden has always sold its private label evaporated milk at lower prices than its Borden brand evaporated milk. The record indicates that it made no general offer to sell private label milk, nor did it solicit such orders. The customers who were supplied with the private label product approached Borden and asked it to make the private label milk available in addition to the Borden brand. These customers all continue to buy and stock the Borden brand along with their own private label brand. The private label milk which Borden sells is chemically identical to Borden brand and is packed in the same way except that private brand labels belonging to the customer are put on the cans instead of the Borden brand labels. The private label milk is sold f.o.b. at a price determined by a cost-plus formula through which Borden adds a margin of profit to the actual cost of producing the milk at the particular plant from which it is shipped. The private label price varies from plant to plant and from month to month at each plant, but is always substantially lower than the Borden brand price which is uniform throughout the country. It is this difference in price between Borden brand milk and private label milk that the Commission attacks as price discrimination.

The Hearing Examiner found Borden had discriminated in price between purchasers of the Borden brand and private label milk and that such products were of like grade and quality, but he found that this practice had not injured competition and that it was not likely to injure competition, and that, in any event, the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the Examiner and found potential in-

jury in both the primary and secondary lines of competition and rejected Borden's cost justification defense. It ordered Petitioner to cease and desist from discriminating in price between competing purchasers of food products of like grade and quality.

Our initial determination must necessarily be whether or not the Commission applied the correct legal test in deciding that the commodities sold at different prices were of "like grade and quality". The facts on this element of the case are undisputed. The question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality". If the products were not of like grade and quality, within the meaning of the Act, then their sale does not fall within the prohibition of Section 2(a). It is vigorously asserted by the Petitioner that Borden brand evaporated milk and the private label evaporated milk sold by Borden are not "commodities of like grade and quality".

The Commission's finding that Borden brand evaporated milk and the private label milk produced and sold by Borden are of like grade and quality is based on the undisputed fact that the chemical content of the products is identical. They are packed exactly the same except that the private label milk does not bear the Borden brand label. The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show that the milk was packed or in any manner handled by Borden. Under the construction of the Act adopted here by the Commission the "like grade and quality" determination was based solely on the physical properties of the products without regard to the brand names they bear or the relative public acceptance enjoyed by each.

Borden contends that the grade and quality of products may vary either because of differences in "intrinsic superior quality" or because of "intense public demand" for one product as compared with another. It asserts that a sharp distinction between premium and non-premium products prevails in the evaporated milk business and that there are three well-known premium brands (Carnation, Pet, and Borden) which customarily command a substantially higher price than the other brands. It contends that private label milk, regardless of who packs it, must be sold at lower prices. Petitioner says the higher price commanded by Borden brand at all levels of distribution is due to the "intense public demand" for the product rather than to any "intrinsic superior quality". Borden puts the same milk in the private label cans as in the Borden brand cans. Chemically, the two products are the same, but Petitioner asserts, commercially, they are quite different. One is a premium product, the other non-premium, Borden contends, and they should be priced accordingly.

The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. Customers at the retail level are willing to pay more for it than for private label because of the Borden name.[9]

[9] For example, one retail grocer testified as follows:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them won't want anything except Pet.

"Q. They don't care what price——

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

The wholesalers who testified recognized that private label milk customarily sells at prices substantially below the premium price commanded by Borden brand milk and the other nationally advertised brands.[3] That the Borden brand is recognized at the manufacturer's level as a premium product is illustrated by the fact that the wholesalers and retailers who bought private label milk from Borden at the lower prices nevertheless kept right on buying Borden brand, at the higher price, in approximately the same quantities. They, in effect, treated one as a premium line, the other as non-premium, recognizing that the Borden brand milk would command a higher price on resale than would the private label milk.

The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the "like grade and quality" determination. The legislative history of the Act is of little assistance on this point. The members of the Attorney General's National Committee to Study the Antitrust Laws were divided on the question,[4]

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[3] As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it. * * * In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] * * * frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. * * * It has got to have $1.50 or $2 a case spread to make it interesting."

[4] The majority of the Committee recommended that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test, but should be taken into account in the injury to competition and cost justification provisions of the statute. The minority of the Committee urged that "significant consumer preferences" be taken into account under the like grade and quality provision, treating demon-

as are the antitrust commentators.[5] We find no case which controls our disposition of this issue.

In construing the Robinson-Patman Act we are mindful of the language of the Supreme Court in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 (1953). The court there said the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".[6] Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and congressional antitrust policies. An established brand name may have a large following among purchasers. This fact can be of great economic significance in a competitive market. We do not believe it was the intention of Congress that such clearly demonstrable consumer preferences should simply be ignored in determining when products may be priced differently. As a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics. It is both proper and consist-

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strable economic differences as calling for evaluation under "grade" as distinct from any purely physical consideration of "quality". Report of the Attorney General's National Committee to Study the Antitrust Laws 158–159 (1955).

[5] In accord with the view of the majority of the Committee are Patman and Austin: Austin, Price Discrimination Under the Robinson-Patman Act, 39 (1959); Patman, Complete Guide to the Robinson-Patman Act, 23, 35 (1936). Rowe is of a contrary opinion. Rowe, Price Discrimination Under the Robinson-Patman Act, 76 (1962).

[6] 346 U.S. 61, 63, 74.

ent with the broad antitrust policy of Congress that they be given recognition under the "like grade and quality" test of the Act. In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

The Commission relies primarily upon this Court's opinion in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F(2) 916 (5th Cir. 1962), a treble damage action in which we upheld the sufficiency of the charge in a complaint that the respondent discriminated in price by selling its nationally advertised liquors at one price while selling identical liquors under different labels to a favored customer at a lower price. That decision clearly does not control this case. The complaint which we upheld there affirmatively alleged that the products, although labeled differently were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands * * * packaged and labeled under different trade names". The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. In the present case, by contrast, the private label customers were forbidden to make any use of the Borden name in selling the private label milk and, so far as the record disclosed, they never represented the private brands to be Borden products. In this case, the brand name had commercial significance. Whatever significance the brand names might have had in *Hartley & Parker,* absent the seller's representation that the differently labeled products were the same was nullified by that representation.

We do not find the administrative precedents urged upon us by the Commission applicable to this case.[7] Although it is true that these administrative decisions all treated goods of differing brands as being of like grade and quality, they are, however, clearly distinguishable from this case. In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it imparted a premium market value to the Borden product which the private label product did not enjoy. That the Borden brand product should sell for a higher price than the lesser known private brands came as no surprise to anyone.

The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a

[7] The Commission relies upon its line of decisions holding that goods which are the same in all respects except labels are of like grade and quality for the purposes of Section 2. *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co., et al.*, 28 F.T.C. 1489 (1939); *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F. (2) 620 (6th Cir. 1939).

significant consumer acceptance such that buyers are willing to pay more for the product which bears that brand, then it is clearly of commercial significance in the most direct and obvious way—namely, it causes the product to sell for a consistently higher price in a competitive market. That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike "grade". Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Borden brand here, as compared to the private label brands.[8] The record shows that identification with the Borden Company through its brand name has value in the evaporated milk market. That value has been clearly proven by Borden in this case and it should be allowed to take it into account in pricing its products.

The Commission precedents which are more analogous to this case are those involving the closely related "meeting competition" defense under Section 2(b).

[8] As pointed out by the Second Circuit in *Atlanta Trading Corp.* v. *F.T.C.*, 258 F. (2) 365 (2nd Cir. 1958), "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded". In setting the Commission's order aside the Court held that certain pork products were not of like grade and quality, pointing out, among other things, that the Commission had failed to take account of the prices at which the products sold.

There the Commission has given full recognition to the significance of the higher prices commanded by premium products in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it.[9] The most recent example is *Callaway Mills Co.*, 3 Trade Reg. Rep. Ph. 16800 (F.T.C. Feb. 10, 1964) where the Commission rejected the seller's meeting competition defense on the ground that it had failed to prove that its carpeting was "similar in grade and quality" to that of the competitor's whose prices it was meeting. The Commission stated that:

> "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods".

The Commission apparently assigned to the "grade" concept the public demand or salability characteristics

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[9] As the Commission stated in *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the produce at a higher price in a normal market".

Similarly in *Standard Oil Co.*, 49 F.T.C. 923 (1953) the Commission stated, "There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

See also *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, rev'd on other grounds, 191 F. (2) 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

of a product and to the "quality" concept its intrinsic or physical characteristics. This approach cuts both ways. If it is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case. The ambiguities of the Robinson-Patman Act are troublesome enough without further muddying the water through inconsistent administrative determinations dealing with important questions of law. Ultimately it is the Court which has the duty to decide such questions. As Justice Brandeis wrote, concurring in *St. Joseph Stock Yards* v. *United States,* 298 U.S. 38, 84 (1936), "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regularly." See also *United States* v. *Morgan,* 307 U.S. 183, 191 (1939).

Since the Commission's erroneous determination that the products were of like grade and quality was an essential element of its cease and desist order, the petition to set aside the order is granted. We do not render any decision on the other questions presented in the case. The Petitioner's arguments concerning injury to competition and its cost justification defense seem to have considerable merit, but we do not pass on them here. The holding that the products were not of like grade and quality requires us to set aside the Commission's order and make it unnecessary for us to consider the other points raised.

Petition to set aside the cease and desist order is

GRANTED.

# APPENDIX B

## United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1964

No. 20463

THE BORDEN COMPANY, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

*On Petition for Review of an Order of the Federal Trade Commission*

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

JUDGMENT

This cause came to be heard on the petition of The Borden Company, for review of an Order of the Federal Trade Commission issued on January 30, 1963, in Docket No. 7129, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition to set aside the cease and desist order in this cause be and the same is hereby, granted.

December 4, 1964.

Issued as Mandate: December 30, 1964.



U.S. GOVERNMENT PRINTING OFFICE: 1965